No. 04-698

Supreme Court, U.S.
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In The Supreme Court of the United States

BRIAN SCHAFFER, a minor, by his parents and next friends, JOCELYN and MARTIN SCHAFFER, et al.,

Petitioners,

v.

JERRY WEAST, Superintendent of Montgomery County Public Schools, and the BOARD OF EDUCATION OF MONTGOMERY COUNTY, MARYLAND,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALASKA, AND OKLAHOMA, AND THE TERRITORY OF GUAM IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE AMICI CURIAE

The amici States have vital interests – fiscal, moral, and legal – in upholding the Fourth Circuit's ruling that where the parents initiate the IDEA hearing to challenge the school system's Individualized Education Program (IEP), the burden of proof should be on the parents.

First, and quite obviously, placing the burden upon the school system, rather than the parents, makes it more difficult to defeat unreasonable demands of parents seeking to abuse the system, needlessly increasing the costs to the states of educating disabled children. In this case, for example, there was evidence that the parents would likely have refused *any public* school IEP because of their predetermined decision to send their child to *private* school, and simply have the state pay for that private education. In addition, placing the burden upon the school system will only encourage parents to make borderline or unreasonable demands, increasing *legal* expenses, too, for states and localities fighting such challenges. The average state has over 130,000 children being served by the IDEA, and thus the fiscal impact to the amici States of an adverse ruling in this case could be substantial.

Most significantly, putting the burden of proof upon the school systems would force them to divert scarce resources to satisfy (or litigate against) borderline or unreasonable claims. This would have the terrible consequence of leaving the states and their school systems with less money to meet the

reasonable needs of truly deserving disabled children.[1]

Any state or school district that wishes to err on the side of supporting parents' preferences – over the school district's contrary assessment – regarding the education of their disabled child is always free to do so *voluntarily*. Any such state can voluntarily craft an IEP that is generous to the parents, or, by state law, impose the burden upon the school district. Therefore, *no* state is benefited by a Supreme Court interpretation mandating a tipping of the balance that forces *all states'* school districts to bear the burden of proof in all cases, which could prove costly when parents make borderline or unreasonable demands. There is thus no meaningful benefit to *any* state of a Supreme Court ruling forcing all states to assume the burden, but only a costly downside, as already explained above. The amici States, therefore, find it quite surprising that Virginia (joined by 8 other states) has filed a brief in support of reversal. If those states wish to have the burden upon the school system, they can choose to *voluntarily*

[1] In addition, a Supreme Court decision placing the burden of proof on the school system would signal a dangerous shift away from the traditional rule that parties bringing challenges bear the burden of proof on their claims, and could thus make it more likely that in *other* contexts – involving laws that are silent as to which party bears the burden of proof – the burden will be shifted to the governmental defendant. Indeed, the Virginia amicus brief appears to support the astonishing position by petitioners that placing the burden of proof on the complaining party in administrative proceedings under IDEA violates due process. *See* Pet. Br. 26; Virginia Amicus Br. 11. That argument is flatly contradicted by this Court's decision in *Lavine v. Milne*, 424 U.S. 577, 585 (1976). But if it were adopted it could dramatically alter numerous administrative proceedings at the state and local level and impose added burdens on government.

assume that burden by *state* law,[2] or they can simply have the school systems craft IEPs responsive to the parents' wishes. The amici States joining this brief believe that putting the burden of proof upon the parents who are challenging the IEP represents the best interests of the states, as well as the best educational interests of disabled children, and that there is no basis for construing the IDEA as imposing a federal burden of proof on school districts in *all* cases.

SUMMARY OF THE ARGUMENT

Despite expressly providing many procedural benefits to parents in the IDEA, Congress did not specifically define the allocation of the burden of proof. This silence combined with a respect for federalism that leaves local matters to the states unless doing so is contrary to the express terms or aims of the IDEA mean that Congress, at the very least, left the allocation of the burden of proof to the policy judgment of each individual state. Moreover, Congress expressly stated that it is the role of the *state or local educational agency* to "establish and maintain *procedures* in accordance with this section to ensure that children with disabilities ... are guaranteed procedural safeguards." Allocation of the burden of proof to the parents (or to the school system) is surely such a procedure, is not

[2] Indeed, the Virginia amicus brief acknowledges this in its alternative argument claiming that states may voluntarily shift the burden to the school districts if the IDEA does not by itself mandate that result. Virginia Amicus Brief at 14-17. It is therefore all the more surprising that Virginia would take the position that Congress silently imposed an extraordinary burden of proof on state and local educators in IDEA hearings.

inconsistent with the section's silence on the matter, and does not deny nor undermine dozens of other IDEA-specified "procedural safeguards."

If this Court, however, believes the IDEA specifies a particular allocation of the burden of proof *uniformly across all states*, as explained below, that burden must rest upon the parents (subject to each state's choice to *voluntarily* assume or place the burden upon the school system as a matter of state law, the IDEA simply setting a minimum federal floor). There is no basis for interpreting the IDEA as establishing a uniform federal rule that school districts *always* bear the burden of proof in IDEA hearings, even when they are initiated by parents.

Because the IDEA is Spending Clause legislation, Congress may not impose any obligation upon the States unless it does so *unambiguously*. The IDEA's utter silence on the burden of proof establishes beyond all doubt that Congress has not *unambiguously* placed the burden of proof upon the states or their school systems. Moreover, the fact that at least four United States Courts of Appeals have concluded that the IDEA does not impose the burden of proof upon the school systems (without relying upon this Spending Clause theory) further belies any claim the IDEA *unambiguously* places the burden upon the school system.

In addition, the traditional rule is that the burden is on the party bringing the action. This Court has followed this principle as to numerous federal civil rights statutes, uniformly making the plaintiffs bear the burden of proof, even though they are the parties the civil rights statutes are designed to protect.

But the case for following the traditional rule is overwhelming in this case because the school system proposing the IEP is a *government* agency, and this Court has always *presumed* that government officials carry out their duties in compliance with their legal obligations. Thus, the school-system-proposed IEP is presumed to fulfill the IDEA's requirement that it provide the child a free and appropriate public education (FAPE). Given that presumption, the burden of proof must rest upon the parents attacking the proposed IEP, lest the presumption have no meaning.

This Court has endorsed this presumption of regularity in the IDEA context by insisting that school authorities' judgments implementing the IDEA be given a measure of deference. Moreover, the presumption is especially strong in this case because nothing in the IDEA's findings suggests the states currently have *intentionally* or *purposely* sought to deny disabled children a FAPE. Because Congress instead views the IDEA as a means of *aiding and assisting* the states in a *mutual* desire to educate disabled children, there is no reason to deny the presumption that states act in accordance with their IDEA legal obligations.

Concern for the educational welfare of disabled children further supports placing the burden of proof upon the parents. First, placing the burden upon the parents will *not* lead to deficient IEPs, as in the vast majority of cases, the allocation of the burden of proof will not affect the outcome at all, and in those rarer cases of evidentiary equipoise, the fact that the parents could not meet their burden of showing the IEP to be deficient suggests, quite obviously, that the IEP is adequate. Second, civil rights plaintiffs bear the burden of proof even if that could, on occasion, mean a victimized plaintiff goes uncompensated,

and they bear this burden even though the private defendants, unlike the school authorities in the IDEA context, are not presumed to act lawfully. Third, petitioners' claim that placing the burden upon the parents hinders IDEA goals cannot be distinguished from a theory that *all* procedural matters must be resolved in favor of the parents; a theory that would make superfluous the IDEA's express provision of various procedural protections for the parents.

Fourth, and most importantly, placing the burden of proof upon the parents actually *promotes* the IDEA's goal of educating disabled children. Given the finite resources available for assisting the education of disabled children, shifting the burden to the school system would mean that states would have to waste precious resources upon questionable programs and services, thereby lessening the funds available to best assist the real needs of disabled children. And because it may cost more to litigate than to concede, the school system may sometimes have to agree to unreasonable or abusive parental demands, further squandering limited resources. Finally, funds will also be depleted because shifting the burden to the schools would encourage *more* parents to demand questionable services, and thus increase the *number* of borderline claims. In short, placing the burden of proof upon the schools simply diverts resources from the genuine needs of disabled children towards parents with doubtful, and often abusive, demands.

Concerns for fairness and relative access to information and expertise do *not* support placing the burden upon the school system. First, the IDEA ensures that relevant information in the possession of the school system is shared with the parents. Second, the IDEA gives parents

the right to obtain disability experts, and legal counsel who may be IDEA specialists, to assist them, and, if they prevail, attorney fees and costs to pay for these experts. Third, parents have access to critical information – including how their child learns, reacts, and adapts, in a multitude of *non-school* settings, and how their child has responded to educational instruction and special assistance in *private* schools – not directly available to the public school authorities.

Finally, even if parents did have less access to information and expertise, civil rights plaintiffs, too, have less access to relevant information and expertise than do their employer defendants; nevertheless, this Court places the burden of proof upon the plaintiffs. Furthermore, if the school really did have greater expertise and information access, the school's proposed IEP should be entitled to *more* deference, not less; placing the burden of proof upon the parents respects that deference.

ARGUMENT

The IDEA's especially strong reinforcement of the presumption of regularity, its principle goal of ensuring an appropriate education for *all* disabled children, and a basic respect for federalism and fairness concerns, dictate that placement of the burden of proof in IDEA administrative hearings should, at minimum, be left to the discretion of each state, or be placed upon the parents seeking to challenge the school system's proposed IEP, unless the school system *voluntarily* chooses to assume that burden. The Court should reject petitioners' argument that the

IDEA silently imposes a federal burden of proof on school systems in all cases.

I. The Silence of the IDEA on Allocation of the Burden of Proof, its specific Delegation of IDEA Procedural matters to the School Systems, and a respect for Federalism, command that the Burden of Proof at minimum be left to each State's Discretion.

If Congress had intended to place the burden of proof upon the school system, it could easily have done so by expressly dictating that result. However, despite imposing numerous requirements upon school systems, and providing all sorts of procedural benefits to the parents of disabled children,[3] Congress did not direct that school systems bear the burden of proof. At the very least, therefore, Congress has left it to the states or their school systems to decide upon whom the burden of proof should rest. To conclude that Congress has, in blanket fashion, imposed the burden upon every school system in the nation is to fabricate a mandate out of congressional silence.

Worse, it would show utter disregard for our federal system, which leaves fundamentally local matters – including, of course, the education of a localities' disabled

[3] To name just a few of the procedural requirements, the IDEA requires school systems to disclose in advance to the parents all evaluations completed to date, and recommendations based upon those evaluations, that the school district intends to use at the hearing. 20 U.S.C. § 1415(f)(2)(A). It assures parents at the hearing the right to be accompanied and advised by counsel and experts, the right to confront and cross-examine witnesses, and many other procedural rights. 20 U.S.C. § 1415(h).

children – to the province of the local authorities provided their decisions do not violate the terms or goals of a congressional statute (that Congress has the authority to enact). *See Wisconsin Dep't of Health and Family Services v. Blumer*, 534 U.S. 473, 495 (2002) ("When interpreting . . . statutes [designed to advance cooperative federalism[4]], we have not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims."[5]); *Smith v. Robbins*, 528 U.S. 259, 275 (2000) ("[I]t is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down [and instead] leav[e] 'the more challenging task of crafting appropriate procedures . . . to the laboratory of the States in the first instance.'"). Instead, by dictating only that the hearing officer make a decision "on substantive grounds based on a determination of whether the child received a free appropriate public education," 20 U.S.C. § 1415(f)(3)(E)(1), without specifying which side has the burden of proof as to that decision, Congress has at the very least left the issue of burden of proof to the states.[6]

[4] "Cooperative federalism" is where "the Federal Government provides financial assistance to participating States to aid them in furnishing" a particular service, *Harris v. McRae*, 448 U.S. 297, 308 (1980), which is "administered by the States." *King v. Smith*, 392 U.S. 309, 316 (1968). The IDEA is thus a paradigm example of cooperative federalism.

[5] *See* footnote 8, infra.

[6] Indeed, as explained in Section II, infra, the federalism concerns are especially strong in the Spending Clause context and actually prohibit this Court from imposing the burden upon a state or its school system without its consent.

Indeed, Congress' only express statutory statement on the matter conclusively validates the view that the states or their school systems have the authority to decide upon which party to place the burden of proof. For 20 U.S.C. § 1415(a) states as follows:

> (a) Establishment of procedures.
>
> *Any State educational agency, State agency, or local educational agency ... shall establish and maintain* ***procedures*** in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

Congress has thus explicitly stated that it is up to the school system to determine all *procedural* matters. Given that § 1415(a) refers to the broad scope of procedures set forth in § 1415, which include the due process hearing specified in subsection (f), the issue of who bears the burden of proof at such a due process hearing is a "procedural" matter. Nothing could be clearer.

Congress did not narrow the school system's authority to select whatever procedures it wanted except to insist that the procedures be "in accordance with this section," and "ensure that children ... and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education." *Id.* Assigning the burden of proof to the parents would obviously *not* violate the "in accordance with this section" mandate, as the section is silent on the matter. Nor would such an assignment deny children and their parents "procedural safeguards." The IDEA spells out numerous procedural safeguards Congress believed necessary to protect the

interests of the parents and their child, but making school systems shoulder the burden of proof was not one of them. Nor can it be said that a party, by the mere fact that it bears the burden of proof, has been denied procedural safeguards, any more than one could say a plaintiff in a typical civil proceeding is denied procedural safeguards by having to bear the burden of proof.[7] Therefore, as long as the school systems devise procedures that meet all the explicit procedural requirements of the IDEA, Congress has, at the very least, left other procedural issues, including the burden of proof, to the states.[8]

Although the burden of proof, consequently, is at minimum a matter for each state to decide on its own, if this Court feels compelled to conclude that the IDEA itself

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[7] It would be improper to conclude that any procedural rule *beneficial* to the parents is required by this language, absent language expressly, or even implicitly, suggesting that rule. Otherwise, school systems would have to devise procedures that were overwhelmingly one-sided, not only placing the burden on the school, but also having that burden employ a clear and convincing (or beyond a reasonable doubt) standard, and fashioning *every* procedure in favor of the parents. This could not have been Congress' intent.

[8] And, as Respondents note in their brief, they and we are unaware of the Secretary of Education disapproving a state's IDEA "policies and procedures," 20 U.S.C. § 1412(a), as failing to "afford[ ] the procedural safeguards required by section 1415 of this title," § 1412(a)(6)(A), because that state placed the burden on the parents. Contrary to Petitioners' assertion that no states by statute or regulation have placed the burden of proof upon parents, Pet. Br. at 19, at least two states have done so – *see, e.g.*, 511 Indiana Administrative Code 7-30-3(p) & (r), referencing Indiana Code 4-21.5-3-14; 707 Kentucky Administrative Regulations 1:340 Section 7(4), incorporating Kentucky Revised Statutes 13B.090(7) (both states placing the burden of proof upon the party requesting agency action or seeking the benefit, which is usually the parents) – and other states do so as a matter of practice, as did Maryland in the case at bar.

imposes a uniform burden of proof across all states and localities, as explained in detail below, that burden must be placed upon the *parents* challenging a proposed IEP. (Of course, a state or locality could still *voluntarily* choose to assume the burden of proof, as the IDEA simply sets a minimum federal floor.[9]).

II. Because the IDEA is Spending Clause legislation, the failure of the IDEA to Unambiguously place the Burden of Proof upon the School System Prohibits this Court from imposing the Burden of Proof upon the States or their School Systems without the States' Consent.

Because the IDEA is Spending Clause legislation, *see Bd. of Educ. v. Rowley*, 458 U.S. 176, 190n.11, 204n.26 (1982), any burdens assumed by the states must be unambiguously expressed.

> "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' . . . Accordingly, *if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.*"

[9] *Cf., e.g., Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648, 658-59 (8th Cir. 1999) ("Several courts . . . have determined that higher *state* educational standards are applicable to a student's IDEA claim brought in that state."); Virginia Amicus Brief at 14-17.

Rowley, 458 U.S. at 190 n.11, 204 n.26 (quoting *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981)). Here, given the unmitigated silence of the IDEA regarding burden of proof (except for certain aspects discussed below that, if anything, suggest strongly the burden should be on the *parents* objecting to an IEP), the IDEA plainly does *not unambiguously* place the burden of proof upon the school district. Indeed, the fact that at least four United States Circuit Courts of Appeals, after studying the IDEA, have concluded that the IDEA does not impose the burden of proof upon the school districts (and they did so without relying upon this Spending Clause ambiguity theory),[10] is further proof that the IDEA does not *unambiguously* place the burden upon the school districts. Accordingly, the Spending Clause ambiguity rule set forth in *Rowley* and *Pennhurst* conclusively dictates affirmance of the Fourth Circuit's decision.

[10] *See Weast v. Schaffer*, 377 F.3d 449, 452-56 (**4th Cir.** 2004); *Alamo Heights Indep. School Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986) (relying upon *Tatro v. Texas*, 703 F.2d 823, 830 (**5th Cir.** 1983), *aff'd in part and rev'd in part sub nom. Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984)); *Doe v. Bd. of Educ.*, 9 F.3d 455, 458 (**6th Cir.** 1993) (citing to *Cordrey v. Euckert*, 917 F.2d 1460, 1469 (6th Cir. 1990), which in turn cites to *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990), which in turn cites to *Tatro*, supra); *Johnson v. Indep. School Dist. No. 4*, 921 F.2d 1022, 1026 (**10th Cir.** 1990) (citing to *Alamo*, supra).

III. Traditional Practice, and the Especially Strong Presumption under the IDEA that School Authorities have Properly Discharged their Legal Duties, require that the Burden of Proof be placed upon the Parents Challenging the School System's proposed IEP.

The traditional rule is that, absent express language to the contrary, the burden is on the party bringing the action, which in this case are the parents requesting the IDEA administrative hearing to challenge the IEP.[11] *See Jones on Evidence* (Clifford S. Fishman, 7th Ed. 1992) Section 3:12 at pp. 239, 242 ("Typically, the plaintiff has the burden of pleading and proving every essential fact and element of his cause of action. . . . " "[T]he burdens of production and persuasion generally fall . . . upon the party that asserts the claim."); *cf.* 5 U.S.C. § 556(d) (in federal administrative hearings, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."). This Court has followed this traditional rule *as a matter of course* under numerous federal civil rights statutes, by imposing the burden of proof upon the plaintiff, even though the plaintiff is the party the statute is designed to protect. *See, e.g., Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806 (1999) (ruling, without discussion, that burden of proving one is a qualified individual with a disability under the Americans with Disabilities Act is upon the plaintiff); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the

[11] The parents challenging the IEP must "present a complaint . . . which sets forth an alleged violation." 20 U.S.C. § 1415(b)(6)(B).

plaintiff [under Title VII] remains at all times with the plaintiff."), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (ruling, without citing precedent or providing rationale, that plaintiff in Title VII claim against governmental employer has initial burden, and that ultimate burden to show employer's rationale for adverse employment decision is pretextual is also upon plaintiff).

Indeed, the IDEA itself suggests application of the traditional rule is appropriate by requiring IDEA hearing officers "to conduct hearings" and "render and write decisions" "in accordance with . . . *standard legal practice*," 20 U.S.C. § 1415(f)(3)(A)(iii) & (iv), which would presumably include applying traditional practice with respect to burdens of proof.

The case for following this traditional rule is especially strong under the IDEA because the school system party, which proposes the IEP, is a *government agency*, and this Court has always *presumed* that government officials fulfill their legal duties by acting in accordance with the law. *See United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies."); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties."). Thus, the school system proposing the IEP (over the objections of the parents) is presumed to have designed the IEP to comply with the IDEA's requirement that it provide the child a free and appropriate public education. Given that presumption, the burden of proof must be on the parents claiming the school system has *not* complied with its IDEA duties in fashioning the IEP. To put the

burden of proof upon the school system would render the presumption of regularity entirely without meaning. If no party puts on any evidence, then the presumption is necessarily unrebutted, and the school system must prevail; but the school system would not prevail under that scenario if the burden of proof were upon the school system. In sum, the presumption that the school system fulfilled its IDEA duties requires the burden of proof to rest upon the parents challenging the school system's IEP. *See Sunday Lake Iron Co. v. Wakefield TP.*, 247 U.S. 350, 353 (1918) ("The good faith of such [state] officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party.").

In sum, because the traditional rule of placing the burden upon the challenger applies even in contexts not involving any presumption of regularity, as it does under the civil rights statutes discussed earlier (where the employer is often a private *non-governmental* entity), *see McDonnell Douglas*, *Cleveland*, supra, *a fortiori*, it certainly must apply under the IDEA, where the school system is a governmental agency whose IEP proposals are presumed to be in accordance with the IDEA.

Moreover, this Court has endorsed the presumption of regularity of school authorities' actions *under the IDEA* by insisting that school authorities' judgments implementing the IDEA should be given a measure of deference. *See Bd. of Educ. v. Rowley*, 458 U.S. at 206 (courts must not "substitute their own notions of sound educational policy for those of the school authorities which they review.").

Furthermore, the findings and purposes articulated by Congress in the IDEA provide further reason to apply the

presumption of regularity. For despite laying out numerous findings justifying the law, Congress makes no finding suggesting that states or school authorities currently are *intentionally* or *purposely* seeking to deny disabled children a FAPE. *See* 20 U.S.C. § 1400(c) (setting forth 14 findings, none of which suggest the states have *deliberately* tried to avoid properly providing for the education of disabled children). Moreover, in the 2004 amendments, Congress found that, in implementing the IDEA, states and school authorities have been successful in "ensuring children with disabilities and the families of such children access to [FAPE] and in improving educational results for children with disabilities." 20 U.S.C. § 1400(c)(3). With absolutely no suggestion – or evidence – of willful resistance by state and local educators, there is no reason to deny the presumption that school authorities fulfill their IDEA obligations in proposing IEPs. Indeed, Congress has viewed the IDEA *not* as a stick to force unwilling states to assist disabled children, but as a means of *aiding and assisting* the states in a *mutual* desire to educate disabled children. 20 U.S.C. § 1400(d)(1)(C) (major purpose of IDEA is to "*assist States, [and] localities* . . . to provide for the education of all children with disabilities."). The presumption of regularity, therefore, should be especially robust under the IDEA.

In sum, the usual presumption of regularity given to *any* governmental agency action is so much stronger in the IDEA context in particular that the burden of proof, if it must be placed upon one party uniformly across the

country, must rest upon the parents seeking to overturn the judgment of the school system.[12]

IV. Concern for the Educational Welfare of Disabled Children Not Only Does Not Support Shifting the Burden of Proof to the School System, but Actually Strongly Supports placing the Burden of Proof upon the Parents.

Much of Petitioners' brief rests upon the basic policy argument that the burden of proof must fall upon the school system because the IDEA's overriding objective is to ensure disabled children access to a meaningful education. This argument is specious for numerous reasons. First, it wrongly presumes that placing the burden of proof upon the parents will lead to an IEP that does not meet the needs of the children. In fact, if the school system devises an IEP and the parents are not able to meet their burden of proof to show that it does not provide a free appropriate public education (FAPE), then there is no reason to believe that the IEP does not provide the child with the required FAPE. Indeed, petitioners themselves acknowledge that the burden of proof in most cases will *not* affect the outcome, except in those cases where the evidence is in equipoise. Pet. Br. at 25.

And in those minority of cases of equipoise, there is no reason to believe that a result in favor of the school system would ever deny a FAPE to the child. After all, because the evidence is in equipoise, the school's IEP could not be

[12] Of course, as noted earlier, supra at footnote 9 and accompanying text, each individual state could *voluntarily* place the burden upon its school system(s), as the IDEA simply sets a minimum federal floor.

demonstrated to be inadequate. Petitioners are thus flat wrong in claiming that in the equipoise situation, there is a 50% chance that the hearing officer's decision upholding the IEP is a "mistake," and that the school system's program is a failure. The hearing officer's upholding the school's IEP in *all* equipoise cases can *never* be a "mistake," but is simply the correct application of the burden of proof to the evidence presented. The 50% claim is even more baseless given the presumption of regularity – discussed in detail in the previous section – that school officials under the IDEA are presumed to act in compliance with their legal obligations under that law.

For similar reasons, petitioners are wrong to suggest that there is a 50% chance of the approved IEP in an equipoise situation failing to adequately educate the child; all that can be said is that there is a 100% certainty that the parents have failed to demonstrate by a preponderance of the evidence that the school's IEP is unsatisfactory. But even if one accepted petitioners' erroneous claim of a 50% chance of failure, the inadequacy of the IEP would be *de minimis* by definition, given the evidentiary equipoise. In sum, the IDEA's overriding objective of ensuring disabled children access to a meaningful education is not at all undercut by placing the burden of proof upon the parents.

Second, even if, contrary to the above, placing the burden of proof upon the parents *did* mean an occasional deficient IEP would stay in place, that would not mean that the burden of proof should be shifted to the school. After all, civil rights plaintiffs bear the burden of proof, even if that burden could on occasion mean a victimized plaintiff goes uncompensated, and even though the overriding goal of the civil rights laws is to protect the plaintiffs. And that holds true even though the private

employer civil rights defendant, unlike the IDEA school authority, is *not* presumed to act within the law.

Third, petitioners' argument cannot be distinguished from a theory that *any* procedural advantage for the school system is a threat to the IDEA's ultimate goal. To accept such an argument is to demand that every matter that is not spelled out in explicit statutory language to the contrary be interpreted in favor of the parents. This cannot be the case as Congress chose to spell out in detail numerous procedural benefits for the parents, which would have been a completely superfluous exercise if plaintiffs' theory held true. Such a demand would also violate the Spending Clause ambiguity rule discussed in Section II, supra.

Fourth, and perhaps most importantly, placing the burden of proof upon the parents challenging an IEP actually *furthers* the IDEA's goal of educating disabled children. It cannot be forgotten that the resources available to educate disabled children are finite and limited. Placing the burden of proof upon the school authorities will mean that states will sometimes have to expend precious resources on *questionable* programs and services, thereby hurting the states' fiscal ability to provide for the *genuine* educational needs of disabled children. Moreover, because *litigating* cases also costs states money, placing the burden upon the school system may cause many school systems to give in to even *wholly unreasonable demands* simply because it would cost more to fight the case than to concede. In addition, even if the school system does *not* concede, and ultimately prevails, it will have to bear the *litigation costs*, as unlike parents, the school authorities do not receive compensation for attorneys' fees (unless the parents' demands were frivolous or brought for an improper purpose). 20 U.S.C. § 1415(i)(3)(B)(i)(II) & (III).

Moreover, placing the burden of proof upon the school system will only *encourage* parents to make unreasonable demands, thereby increasing the *number* of borderline or downright unreasonable claims. This, of course, will only further deplete valuable resources as the school systems either give in to (thereby expending money on unnecessary services), or fight (thereby expending money on litigation expenses) those demands. **Either way, given the reality of limited resources, placing the burden of proof upon the school systems will have the ultimate effect of shifting services away from fulfilling the real needs of disabled children and towards parents with questionable, and sometimes abusive, demands.**

Therefore, any desire to promote "justice," to be "compassionate," or to best serve the interests of disabled children in general, in fact calls for placing the burden of proof upon the parents, not the school system. Indeed, the Administrative Law Judge in this very case concluded "there was a design by the parents to simply obtain funding from MCPS for a predetermined decision to have the Child attend *private* school." *Weast v. Schaffer*, 240 F.Supp.2d 396, 401 (D. Md. 2002), *rev'd on other grounds*, 377 F.3d 449 (4th Cir. 2004). Thus, "justice" is often served by rejecting parents' borderline or questionable demands.

In any event, petitioners' attempt to portray the matter as one of erring on the side of disabled children – *see* petitioners' flawed balancing of the *Mathews v. Eldridge* factors, Pet. Br. at 24-26 – erroneously assumes that ruling in favor of the parents in close cases can only help disabled children, when, in fact, it simply diverts resources away from undeniably deserving children to students with more aggressive or demanding parents, and

whose demands cannot be substantiated by a preponderance of the evidence.

Finally, petitioners' argument that placing the burden upon the school system promotes accountability is nonsense. Even if the burden of proof rests upon the *parents*, and assuming the parents will put on *some* case,[13] the school system will have to justify its IEP if it hopes to win. Thus, accountability is assured by the IDEA's basic mandate that the school system providing a FAPE; shifting the burden of proof to the school system adds nothing to accountability.

V. Concerns for Fairness and Relative Access to Information and Expertise Also Do Not Support Shifting the Burden of Proof to the School System.

Much of Petitioners' case is rooted in the theory that the school system has greater access to relevant information or expertise and thus is in a better position to bear the burden of proof. This theory is flawed for two principle reasons.

First and foremost, the premise upon which it rests – that the school system has greater access to relevant information and expertise – is simply not true in most, if not all, cases. The IDEA itself ensures that relevant information held by the school system is shared with the parents. *See* 20 U.S.C. § 1415(b)(1) (requiring that the parents be given "[a]n opportunity . . . to examine all

[13] If the parents cannot or are unwilling to put on some case demonstrating why the proposed IEP is insufficient, they do not deserve to prevail.

records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a [FAPE] to such child"); 20 U.S.C. § 1415(f)(2)(A) (requiring school system to disclose in advance to the parents all evaluations completed to date, and recommendations based upon those evaluations, that the school district intends to use at the hearing). The comprehensive information-sharing mandates of the IDEA thus undermine petitioners' theory.

The IDEA also ensures that parents have the right to obtain legal counsel and disability experts. *See* 20 U.S.C. § 1415(h)(1) (giving parents at the hearing the right to be accompanied and advised by counsel and child disability experts); 20 U.S.C. § 1415(b)(1) (requiring that the parents be given "[a]n opportunity . . . to obtain an independent educational evaluation of the child"). And because the IDEA provides that prevailing parents may be awarded "reasonable attorneys' fees as part of the costs," 20 U.S.C. § 1415(i)(3)(B)(i)(I), all parents, rich or poor, have a fair chance to obtain qualified counsel and experts. Thus, parents can obtain all the legal and educational expertise they desire, by hiring attorneys *who specialize in IDEA litigation* and who are familiar with the educational needs of disabled children, local school disability education resources that may satisfy those needs, IDEA legal intricacies, and any other relevant matter.[14] There is thus no

[14] Although it is possible that indigent parents will not be able to obtain such legal representation, that is likely to be the case only where the parents' case is without merit, as a meritorious case will surely attract IDEA legal specialists whose compensation is practically guaranteed by the IDEA fee award provisions.

(Continued on following page)

significant disparity in access to relevant information or expertise.[15]

Moreover, not only do parents have access to key information and expertise available to the school system as explained above, but, conversely, *parents have access to critical information not generally available to the school system*. Chief among the information uniquely within the possession of the parents is how their child responds to and reacts in all sorts of settings and situations *outside* of school. Parents will thus have more complete and comprehensive information as to the extent of a child's disability, how that disability affects the child's ability to do certain tasks or learn various concepts, and the effectiveness of certain aids or accommodations in overcoming that disability.

And even in the unlikely event indigent parents with a meritorious case cannot find qualified counsel, the IDEA assures that they are provided with legal resources to represent their child's interests. *See* 20 U.S.C. § 1415(b)(8) (ensuring that parents have a "model form to assist [them] in filing a complaint and due process complaint notice"); § 1415(c)(1) (providing parents with notice regarding, among other things, "sources for parents to contact to obtain assistance in understanding the provisions of this subchapter"); § 1415(d)(1) & (2) (providing parents a "copy of the procedural safeguards available to the parents of a child with a disability," which include "independent educational evaluation," "access to educational records," "the opportunity to present and resolve complaints, including – [] the time period in which to make a complaint," "due process hearings, including requirements for disclosure of evaluation results and recommendations," "State-level appeals," "civil actions," and "attorneys' fees.").

[15] Petitioners claim that some circuits do not allow expert witness fees. But to the extent that is true, that was Congress' judgment (in the view of those particular circuits) to not allow reimbursement for such fees. It cannot be that Congress' purposeful decision to disadvantage parents on one matter requires us to advantage them on any number of other procedural matters, such as the burden of proof.

Furthermore, where the child is in a *private* school setting, as was the case here, the public school system does not even have direct access to information regarding how the child performs *in school*. The parents, on the other hand, will naturally receive reports from the child's private school teachers as to the performance of their child in the school setting, and how the child's learning is impacted by any accommodations or special services that are provided. In short, it is the *parents* who have the superior access to relevant information, not the public school authorities.

Petitioners assert that relative access to information should be judged in the general situation, not the exception. But it is far from clear which case is the exception, as disabled children will often be in private school settings. And even in the public school setting, where the child is having an IEP with special services or accommodations developed for the *first* time (e.g., when the disability is finally recognized by the school), the school may have little or no special knowledge of the child's disability, or how the child will respond to various potential special services. The parents, on the other hand, with their every day experience with the child in all sorts of non-school settings, may have unique knowledge of the extent of their child's disability, its affect upon the child's abilities and learning capacity, and how that child responds to various accommodations or special assistance outside of school.

The second reason petitioners' theory is flawed is that even if, contrary to all of the above, the school system really did have greater access to relevant information and expertise, that still would not warrant shifting the traditional burden of proof from the parents to the school system. Federal law discrimination plaintiffs – under, e.g.,

Title VII, ADA, ADEA, etc. – have the ultimate burden of persuasion, *see* discussion, supra at 14-15, even though the employer in those cases has better access to the reasons why it did not hire or promote a person, and despite the employer generally having greater resources available to fight such lawsuits. And this is true even though such private employers, unlike school systems under the IDEA, are *not* presumed to act lawfully.

Moreover, if the school system really did have greater expertise and access to information, then its judgment as to the proper IEP should be entitled to *more* deference. Placing the burden of proof upon the parents attacking the school system's judgment respects that deference.

CONCLUSION

For the foregoing reasons, placement of the burden of proof should, at minimum, be left to the discretion of each state, or its school systems. But if the IDEA does prescribe a uniform allocation of the burden of proof, that burden should rest upon the parents challenging the school system's IEP, subject to each state's authority to *voluntarily* place the burden of proof upon its school systems. Because Maryland has not voluntarily assumed on behalf of its school systems the burden of proof in IDEA hearings, the court of appeals correctly held that the parents bore the burden of proof in the IDEA hearing in this case.

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